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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1947.

No. 689

THE GREAT LAKES TOWING COMPANY,
Petitioner,

vs.

AMERICAN STEAMSHIP COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Neither the District Court nor the Circuit Court of Appeals found it necessary to a determination of the case to make decision on the question whether petitioner could lawfully contract against liability for negligence.

The District Court made a finding of fact as follows:

> "Twenty-fourth: That master of the steam tug Idaho knew what was expected of the tug and selected the method of performing the maneuver without any request for instructions from the Steamer and the tug undertook to render its help and assistance in the normal and usual way without in any respect becoming subordinated to the direction or control of the Steamer or her master and, in fact, the master of the steam tug expected to signal the Steamer when the situation required the use of the Steamer's engines and he did not expect the Steamer to work her engines without order from him."

One of the conclusions of law of the District Court was:

> "Fifth: That the maneuver was jointly undertaken and required the cooperative enterprise of both

> the steam tug and the Steamer and under and upon the facts, the provisions of Clause 17 of the general terms and conditions of the respondent Towing Company's tariff did not have application."

The Circuit Court of Appeals, referring to its own decision in *Great Lakes Towing Co. v. Bethlehem Transp. Corp.*, 65 Fed. 2, 543, with regard to the facts involved in that case, said:

> "The master of the Yale (the tug) knew exactly what service was required of him and his vessel and he proceeded to perform that service but on his own initiative without subordination to, although with the cooperation of, the master of the Maryland."

With regard to the facts in this case and referring to the facts just recited, the court said:

> "This was precisely what happened in the present case and a conclusion similar to that reached in the cited case seems to be justified not only by the present facts but by the proviso in Paragraph 17 that the tug carries out the orders of the vessel master."

The decision of the Circuit Court of Appeals rests upon an interpretation of Paragraph 17 that it contemplated that any tug master to bring himself and his tug within the provisions of the clause would take some affirmative action to put himself under the direction and control of the master of the steamer.

While a review of the decisions of the Supreme Court led the Circuit Court of Appeals to indicate that it felt the doctrine of *The Syracuse*, 79 U. S. 167, was still controlling, nevertheless it did not have to decide that question and in reality all it did was decide the case upon an interpretation of Clause 17 of petitioner's tariff.

The court said:

> "Were we therefore compelled to decide the case upon the validity of paragraph 17, it might seem to us

that decision must be controlled by the doctrine of *The Syracuse,* whatever might be our own view of the principle or its applicability to the present case. A narrower ground for decision, however, appears."

It put its decision of the case in the following language:

"The proviso seems to contemplate that some direction would be sought and given. Here, there was no request for orders and no opportunity furnished for their being given. It would seem that something more was in contemplation by this provision than standard signals, or direction otherwise given that might fail in timeliness during operation. If it should be argued that the view here expressed emasculates the tariff provision if valid, the short answer would be that the master of the tug might readily have put the issue beyond doubt merely by asking the master of the steamer how he wished the maneuver to be performed. The tug, however, proceeded on its own initiative without requesting direction or furnishing an opportunity for direction to be given. We think Great Lakes Towing Co. v. Bethelehem, *supra,* rules the present controversy."

The Court also held that an amendment to Clause 17 made subsequent to the decision of the court in *Great Lakes Towing Co. v. Bethlehem Transp. Corp., supra,* by the addition of the words "and the master and crew of the tug shall be and shall be held to be the servants and agents of the vessels served" had no bearing upon the question whether the tug actually subordinated itself to the tow to bring the clause into operation.

Obviously the amendment was a mere statement of a legal conclusion that would have resulted from the application of Clause 17 as it read before the amendment if the clause came into operation and had validity.

The amendment was patently added with a design to secure the application of the rule of *Sun Oil Co. v. Dalzell Towing Co.,* 287 U. S. 291.

The Circuit Court of Appeals held that the Dalzell case had no application either to the facts of this case or the contract provisions involved in the case.

Clearly, as decided by the Circuit Court of Appeals, the case involves only an interpretation of a contract. The contract is that of the Towing Company which has a monopoly of towing for hire in most of the important ports of the Great Lakes. The Circuit Court of Appeals for the Sixth Circuit is probably more familiar with the conditions obtaining on the Great Lakes than any other court.

Petitioner is still operating under a decree of the Circuit Court of Appeals for the Sixth Circuit under decision reported as *United States v. Great Lakes Towing Company,* 208 Fed. 733, where the court held:

> "It is entirely safe to say that since 1904 the Great Lakes Towing Company has had no real competition in harbor towing at either of the 14 ports, except to a limited extent at Chicago for a little later period, and that it now controls 95% of the harbor towing on the Great Lakes at the 14 ports concerned."

We find difficulty in appreciating that the case presents any question which should be reviewed by the Supreme Court.

The doctrine of The Syracuse, 12 Wall. 167; 79 U. S. 167 (20 L. Ed. 382) that it is unlawful for a tug to contract against her negligence, still rules.

At the time of the argument of The Syracuse it was well settled that the tug could not by contract exempt herself from the obligation to use care and skill in her navigation.

Mr. Justice Nelson in *The Princeton,* 3 Blatchf. 54, Fed. Case 11,434 (1853) had held:

> "An agreement to be towed 'at the risk of the master and owners' of the tow, does not exempt the tug from proper and responsible care and skill in her navigation."

In *The Brooklyn*, 2 Ben 547, Fed. Case 1938 (1868), Mr. Justice Blatchford held at page 240:

> "In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage * * *. The obligation of the steamboat not to commit such tort arose out of the principle, applicable in all cases of tort '*sic utere tuo ut non alienum laedas.*' Her duty did not result the consideration paid or to be paid for the towage. It was imposed by the law, and would have existed even though her service had been gratuitous."

This policy of the law was so fixed and well settled that Mr. Benedict, who was proctor for the tug in the case, did not even urge that a contract under which the vessel was to be towed "at her own risk" had effect to relieve the tug from the obligation to exercise ordinary care and skill in her navigation.

A policy of the law could hardly be announced with more clarity or more definitely than as announced in the case of The Syracuse, where the Court said:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The doctrine was reaffirmed in *Compania de Navegacion v. Fireman's Fund Insurance Co.*, 277 U. S. 66 (1927) where in an opinion by Chief Justice Taft it was held:

> "The rule laid down by The Syracuse, 12 Wall. 167, 171 covers this point."

> *The case of Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932) does not have effect to make an attempt by the tug to relieve herself from liability for negligence lawful against the doctrine of The Syracuse.*

The Dalzell case arose out of the handling of the Tanker Sabine Sun in New York harbor in a movement in which several tugs were employed. The master of one of the tugs went on board the tanker and directed the maneuver. No fault was imputed to the tugs themselves, the fault charged being in connection with the maneuvering and direction. The tug master when he was on board the tanker not only directed the movement of the tugs but also under the agreement *handled the vessel herself* acting as her pilot. The vessel used her own power and was assisted by the tugs.

In its opinion the court distinguished the business of towage in which the respondent Towing Company was engaged, from the pilotage service rendered by the tug master when he was on board the towed vessel, saying:

> "Respondent's responsibility is not to be extended beyond the service that it undertook to perform. *It did not furnish pilotage.* The provision that its tug captains while upon the assisted ship would be the servants of her owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. Denton v. Yazoo & M. Valley R. Co., 284 U. S. 305, 308, 76 L. Ed. 310, 311, 52 S. Ct. 141."

It will be noted that the decision was grounded upon rules announced in other fields of law and in such cases as:

Standard Oil Co. v. Anderson, 212 U. S. 215, 220-225;

Linsted v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, 32-35;

Denton v. Yazoo & M. Valley RR. Co., 284 U. S. 305, 308-311.

This court itself in the Dalzell case at page 295 said:

> "The decree under consideration is not in conflict with the decisions of this court cited by petitioner, The Syracuse, 12 Wall. 167, 20 L. Ed. 382, and Compania de Navegacion v. Fireman's Fund Ins. Co., 277 U. S. 66, 72 L. Ed. 787, 48 S. Ct. 459. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns."

However much the petitioner would like to find support in the Dalzell case for relief from liability for negligence while engaged in rendering towage services, its view that there is such support is not consistent with the language of the Supreme Court quoted above.

Respectfully submitted,

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